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***Tinkering with the Student Speech Test: A Much Needed Update to the First Amendment
Quandary for the Cyberbullying Epidemic***

I. INTRODUCTION: “SHE DESERVED TO KILL HERSELF...”

The two minute, five second video, perhaps considered quaint at its actual date of filming, is today, instantly and eerily recognizable. The YouTube embodiment, which has been taken down and reposted numerous times, boasts a monstrous amount of hits, well past the million mark.¹ In a single camera shot, Jamey Rodemeyer’s big brown eyes lock focus with his computer camera.² His shiny braces reflect off the screen and his dresser mirror behind him as he painfully, yet frequently, smiles through his video-narrative. The Buffalo native had proclaimed himself as openly gay before he reached his teen years³ and was participating in an online video project called “It Gets Better”⁴ when he posted the aforementioned video-diary about his experiences.⁵ His peers responded negatively to the declaration and students posted messages of hate on his Facebook wall,⁶ Twitter account, and blog.⁷

¹ Jamey Rodemeyer, *It Gets Better, I promise!*, YOUTUBE (May 4, 2011), <http://www.youtube.com/watch?v=Pb1CaGmdWk>. Jamey’s YouTube “channel” and profile contains other videos he posted regarding his experiences with bullying and is still operated by his sister. See Jamey Rodemeyer, *And This is Jamey’s HAUS (xgothemo99xx’s Channel)*, YOUTUBE (Last updated Oct., 2011), <http://www.youtube.com/user/xgothemo99xx>.

² *Id.*

³ Carolyn Thompson, *Jamey Rodemeyer’s Suicide Leads to Bullying Spotlight, Caution*, THE HUFFINGTON POST, Sept., 28, 2011, http://www.huffingtonpost.com/2011/09/29/jamey-rodemeyers-suicide-_n_987054.html.

⁴ See Dan Savage, *What is the It Gets Better Project*, <http://www.itgetsbetter.org/pages/about-it-gets-better-project/> (last visited Dec. 30, 2011). The project, created by journalist Dan Savage and his partner Terry Miller, encourages individuals to personally reach out in support of LGBT youth by posting user-made YouTube Videos and was initially created in response to many young people taking their lives after being bullied by fellow students. *Id.*

⁵ Thompson, *supra* note 3.

⁶ See Interview by Anderson Cooper with Alyssa, Tracy, and Timothy Rodemeyer, Sister, Mother, and Father of cyberbullied suicide victim Jamey Rodemeyer, in D.C. (Oct. 3, 2011) (available <http://www.andersoncooper.com/2011/10/02/jamey-rodemeyer-family-speaks-out-about-bullying/>). Students responded with comments such as, “Jamey is stupid, fat and ugly. He must die. I wouldn’t care if you died. :) No one would – just do it. It would make everyone way more happier.” *Id.*

⁷ Thompson, *supra* note 3.

In September 2011, 14-year-old Jamey hung himself outside his parents' home.⁸ Jamey's 14-year old sister discovered his body on the family swing set, "the same swing set that he was on since he was three years old. That we built special for them," Jamey's mother later reported.⁹ At a school dance the day of his wake, while Jamey's friends huddled in groups consoling each other, a Lady Gaga song was played to honor the teen.¹⁰ Other students present, however, yelled they were glad Jamey was dead, simultaneously taunting his younger sister who was present.¹¹

While deaths like Jamey's send shockwaves through communities, they are becoming horrifyingly more common. In 2009, there was the story of Phoebe Prince, a young girl who transferred to South Hadley High School in Massachusetts from Ireland and as a freshman began dating a senior football player.¹² In response, a group of girls began bullying her online, calling her "whore" and "Irish slut" through the social networking media of Facebook, Twitter, Craigslist and Formspring.¹³ School officials claimed they could not discipline any of the student bullies and the online harassment quickly gave way to face-to-face bullying.¹⁴ On January 14th, 2010, Phoebe hung herself in the stairwell of her home.¹⁵

Typing any combination of the terms "cyberbullying" and "suicide" into Google reveals a familiar pattern: students bully a fellow peer via the Internet, school officials are unaware or

⁸ *Id.*

⁹ Interview with the Rodeymeyer family, *supra* note 6.

¹⁰ Thompson, *supra* note 3.

¹¹ *Id.* Another interesting follow-up question which is increasingly becoming ripe for examination and being highlighted by the media, is whether or not it is within the school districts discretion to punish speech which occurs even after a victim has passed. Arguably it is, as it has great chance of not only be materially disruptive to learning, but also could be construed as cyberbullying towards surviving family members, thereby creating "new" victims.

¹² Helen Kennedy, *Phoebe Prince, South Hadley High School's 'New Girl,' Driven to Suicide by Teenage Cyber Bullies*, DAILY NEWS, Mar. 29, 2010, http://articles.nydailynews.com/2010-03-29/news/27060348_1_facebook-town-hall-meetings-school-library. Phoebe's tormentors now face criminal charges for their actions and her case has prompted change to Massachusetts's state laws. *Id.*

¹³ *Id.* "Formspring" is a social-networking/media site that can be linked to Facebook accounts and is a self-described way to "[f]ind out more about your friends by asking and responding to interesting questions." FORMSPRING, <http://www.formspring.me/> (last visited Jan. 3, 2012).

¹⁴ Kennedy, *supra* note 12.

¹⁵ *Id.* After her death, Phoebe's cyber-tormentors continued to post messages of hate on her Facebook wall. *Id.*

powerless, and the teen is eventually driven to suicide. The search results are chilling, listing the names and stories of young, dead individuals, in a haunting cyber-eulogy. Alexis Pilkington—June 17, 1992-March 21, 2010.¹⁶ Like Phoebe and Jamey,¹⁷ bullies continued to post messages of hate on Alexis’s memorial page after the teen took her own life, with one anonymous comment reading, “She was obviously a stupid depressed [expletive] who deserved to kill herself. she [sic] got what she wanted. be [sic] happy for her death. rejoice [sic] in it.”¹⁸

Some of the following names may be vaguely familiar to you—maybe you heard them on a news clip or saw them in a recent paper. Perhaps you are aware of them because they hit closer to home; maybe you knew someone who knew someone who knew them. But regardless of how you know their names, the fact remains that each name belongs to a victim. “Victim” is a negative term, albeit one with legal significance, yet it is one that conceals a person, an individual, beneath its harsh exterior. In most cases this person—this human being, suffered a dramatic loss as a result of words that were directed at them through a screen, while the author cowardly hid in the refuge provided by the anonymous space.¹⁹ The number of “victims” is growing²⁰ and will continue to grow if nothing is changed regarding the way the legal system—

¹⁶ Edecio Martinez, *Alexis Pilkington Brutally Cyber Bullied, even After her Suicide*, CBS NEWS, Mar. 26, 2010, http://www.cbsnews.com/8301-504083_162-20001181-504083.html. The seventeen-year-old Alexis, who had already received a soccer scholarship to attend college, took her life in her Long Island home as a result of continued online harassment. *Id.* Pilkington’s parents initially claimed that their daughter had been depressed before the online bullying began, but later admitted that their daughter’s death was most likely the ultimate result of the ongoing harassment and threats. *Id.*

¹⁷ See Thompson *supra* note 3 and text accompanying; see also Kennedy *supra* note 12; see also *supra* note 11 and text accompanying.

¹⁸ Martinez, *supra* note 17. Finally, there was Ryan Halligan—who was only an 8th grader. See Interview by PBS Frontline with John Halligan, victim’s father, found at <http://www.pbs.org/wgbh/pages/frontline/kidsonline/interviews/halligan.html>, (Oct. 19, 2007). After being repeatedly harassed for his learning disabilities, frequently taunted as being homosexual, and made to believe that a girl from his class liked him, the Vermont boy took his own life in 2003. *Id.*

¹⁹ See Daniel *infra* note 89 at 623.

²⁰ See Amanda Lenhart, Marry Madden, Aaron Smith, Kristen Purcell, Kathryn Zickuhr, Lee Rainie, *Teens, Kindness and Cruelty on Social Network Sites*, PEW RESEARCH CENTER, FOSI, Nov. 9, 2011, <http://www.pewinternet.org/Reports/2011/Teens-and-social-media/Summary.aspx>. The study reports that of the 95% of social media-using teens who have witnessed cruel behavior on social networking sites, 66% have also reported they witnessed others joining the bullying and 21% admitted they joined the harassment as well. *Id.*

both the construction afforded by judicial tests and the legislature currently on the books—conceptualizes cyberbullying.²¹ The main problem in implementing this “change” however is that school districts frequently claim they are unable to punish students for off-campus internet speech, for fear of infringing on students’ First Amendment freedom of speech rights.²² Where the line should be drawn as to both remedial and preventative action by school districts depends on a redefining of the jurisprudence surrounding student Internet speech. In sum, the discretion that the law affords school administrative procedures in dealing with discipline must ultimately be broadened.

It is the off-campus Internet speech, activity, and bullying that remains a question and an area of heavy debate within the federal circuits.²³ On June 13, 2011 the United States Court of Appeals for the Third Circuit, filed opinions for both *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*, two factually similar cases involving cyberbullying and student-protected Internet speech.²⁴ In each of these much anticipated decisions, the Third Circuit held that the student-created offensive and derogatory profiles posted on MySpace from home computers,²⁵ were in fact protected by the First Amendment and the respective school

²¹ See Daniel, *infra* note 89 at 626–627.

²² *Id.* at 641. Daniel describes students as hiding behind the “First amendment shield,” where the law, in some aspects, is unable to reach them. *Id.* See e.g. Emmitt v. Kent Sch. Dist. No. 415, 92 F.Supp.2d 1088, (W.D. Wash. 2000); Beussink v. Woodland R–IV Sch. Dist., 30 F.Supp.2d 1175, (E.D. Mo. 1998); but see J.S. ex real v. Bethlehem Area Sch. Dist., 757 A.2d 412, (Pa. Cmwlth. 2000).

²³ See Daniel, *infra* note 52 at 626. The author continues by noting that, “This First Amendment protection, originally invoked by students wishing to express their political views in *Tinker*, has unfortunately been overemphasized by federal district courts, whose opinions have in turn taught school personnel to be wary of disciplining potential bullies.” *Id.*

²⁴ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205 (3d Cir. 2011) (Jordan, K., concurring), aff’g 496 F.Supp. 2d 587 (W.D. Pa. 2007); *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, (3d Cir. 2011).

²⁵ See *Layshock*, 650 F.3d at 210 (the parody profile portrayed the principal as often getting drunk, doing steroids, smoking “big blunt[s],” and shoplifting from Kmart); see *J.S.*, 650 F.3d at 918 (the female principal’s fake profile listed her interests as hitting on students, spending time with her unattractive child, and engaging in sexually deviant acts).

districts had erred in punishing the students for the off-campus speech.²⁶ These holdings, which produced a split between the Third Circuit and cases already decided by the Second Circuit,²⁷ are extremely problematic, providing none of the much needed guidance for students, administrators, or teachers with regard to the growing problem of cyberbullying.²⁸ Before the Court's June 13th holding, scholars and critics alike predicted that the decision would produce a definitive answer as to whether or not school districts could punish off-campus speech in general.²⁹ Unfortunately, that the Third Circuit's en banc ruling did not provide the much-needed guidance regarding student speech.³⁰

Such ambiguities remain and will continue to remain: on January 17, 2012, the Supreme Court denied certiorari³¹ in both *Layshock* and *J.S.*' cases, as well as another speech case, *Kowalski v. Berkeley County Schools* involving a student suspended for abusing a classmate in a 2005 off-campus-created website, which she then sent to fellow students urging them to comment.³² Given the broad range of federal court opinions on the subject, many, including the Pennsylvania ACLU attorneys involved in the case, had hoped the Supreme Court would decide the question relating to student Internet speech and cyberbullying sooner rather than later.³³ While the court gave no reason for its decision to resolve the conflict, Francisco Negron Jr.,

²⁶ *Layshock*, 650 F.3d at 207; *J.S.*, 650 F.3d at 920.

²⁷ See e.g. *Doniger v. Niehoff*, 2011 WL 1532289, (2d Cir. 2011) (affirming on appeal that the school district had not erred and there was no first amendment violation when a student was punished for off-campus online speech because she intended the blog eventually be viewed on campus).

²⁸ See Thomas Wheeler, Facebook Fatalities: Students, Social Networking and the First Amendment, 31 PACE L. REV. 182, 227 (2011). Many commentators exhibited the impression that the courts rulings in *Layshock* and *J.S.* would end the uncertainty surrounding this problem. *Id.*

²⁹ See *id.*

³⁰ See *supra* note 28.

³¹ *Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 11-502, 2012 WL 117558, *1 (U.S. Jan. 17, 2012) (denying also the *Layshock*'s case and *Kowalski*'s 4th Circuit Case).

³² 652 F.3d 565, (4th Cir. 2011)(holding the school district did not violate the student's free speech rights in suspending her nor did they violate her due process rights for issuing her suspension without a hearing, for posting the website).

³³ Maryclaire Dale, *Online Student Speech Appeals Rejected by Supreme Court*, HUFFINGTON POST, Jan. 17, 2012, http://www.huffingtonpost.com/2012/01/17/court-rejects-appeals-in-_0_n_1210399.html.

general counsel for the National School Board Association, urged the court to reconsider an off-campus Internet speech case as soon as possible.³⁴ Negron argued that because “technology blurs the lines between on-campus and off-campus speech, school districts need clear guidance to be able to effectively address extreme off-campus speech that interferes with a safe and orderly learning environment.”³⁵

II. BACKGROUND: THE SAME THING OVER AND OVER AGAIN

A. *The Court’s Authority to Control and Ability to Protect*

In determining whether students can be disciplined for off-campus conduct involving the use of the internet, courts first need to ascertain whether the social networking or cyber posts in question are, in fact, protected speech. In doing so, the judiciary turns to a line of Supreme Court cases dealing with student speech in general. As with speech that appears in more traditional educational contexts, an important factor the courts examine is whether Internet postings caused, or had a reasonable potential to cause, a substantial disruption in schools.³⁶

The 1969 Supreme Court holding in *Tinker v. Des Moines Independent Community School District* initiated the concept that a student has a right to express him or herself, while at school, so long as the speech does not interfere with the rights of others or the school’s disciplinary system.³⁷ Only when a student’s conduct, whether in class or out, “materially disrupts” the classwork or involves a substantial disorder amounting to an invasion of the rights of others, is the speech not afforded any Constitutional protection.³⁸ *Tinker* thus set the standard by which all courts begin an analysis in determining whether students can be disciplined for

³⁴ See Bill Mears, *High Court Rejects Appeals on Public Prayers, Student Speech*, CNN U.S., Jan. 17, 2012, available at http://articles.cnn.com/2012-01-17/us/us_sctus-appeals_1_appeals-court-student-speech-high-court/2?_s=PM:US.

³⁵ *Id.*

³⁶ See Ronald D. Wenkart, *Disruptive Student Speech and the First Amendment: How Disruptive Does it Have to Be?*, 236 Educ. L. Rep. 551 (2008). Wenkart provides a discussion of related issues.

³⁷ 393 U.S. at 512–513.

³⁸ *Id.*

expressions either on or off campus. Decided during the political turmoil of the 1960s and the Vietnam War, the Court invalidated the policy of a school board in Iowa prohibiting students from wearing black armbands in school to protest the war.³⁹ Stating that “it could hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” the *Tinker* Court attempted to balance the rights of students against the previously recognized needs of educators to preserve discipline and order in schools⁴⁰. The Supreme Court viewed the dispute as one “involve[ing] direct, primary First Amendment rights akin to ‘pure speech,’”⁴¹ rather than one “concern[ing] speech or action that intrudes upon the work of the schools or the rights of other students.”⁴²

Thus, in order to prohibit the students from expressing particular points of view, the Court was convinced that the school officials must be able to show that their actions were motivated by something more than a bald desire to avoid the discomfort and unpleasantness that always accompany an unpopular view.⁴³ Where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.⁴⁴ Moreover, the Court proclaimed that disciplining students for expression violates the First Amendment unless school authorities can show either a material or substantial disruption occurred or that the potential for disruption was reasonably foreseeable.⁴⁵

About Seventeen years after *Tinker*, the Supreme Court examined the limits of student expression in *Bethel School District No. 403 v. Fraser*, a dispute in Washington state involving a

³⁹ *Id.*

⁴⁰ *Id.* at 506.

⁴¹ *Id.* at 508.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Tinker*, 393 U.S. 503 at 509 (citing *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

⁴⁵ *Id.*

student who delivered a vulgar speech at a school assembly prior to student body elections.⁴⁶ While the speech did not contain any explicit profanity, it consisted of elaborate, graphic, and explicit sexual metaphors.⁴⁷ The speech caused a substantial disruption, as some students in the audience cheered while others exhibited embarrassed behaviors.⁴⁸ The student had ignored warnings from two educators not to deliver the speech and was suspended for three days for violating the school's rule prohibiting obscene and profane language.⁴⁹

The Supreme Court, reversing the Ninth Circuit's ruling in favor of the student, held that school officials are not prohibited from disciplining students for offensively lewd or indecent speech under the First Amendment.⁵⁰ The Court continued by reasoning that school administrators were justified in disciplining the student for violating school rules because he delivered the speech after being advised against doing so.⁵¹ The Court distinguished the speech in *Fraser* from that in *Tinker*, where the students wearing of armbands were a passive, non-disruptive expression of a political position, rather than an obscene speech incident to a student election, lacking a real political viewpoint and delivered to an unsuspecting captive audience.⁵² Recognizing the duty of school personnel to control students habits and instill manners of civility, the Court insisted that "the determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."⁵³

Additionally, in *Hazelwood School District v. Kuhlmeier*, the Supreme Court addressed an issue concerning school officials' control over school-sponsored publications.⁵⁴ In *Kuhlmeier*

⁴⁶ 478 U.S. 675, 678 (1986).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 685.

⁵¹ *Id.*

⁵² *Fraser*, 478 U.S. at 684.

⁵³ *Id.* at 683.

⁵⁴ 795 F.2d 1368 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988), remanded to 840 F.2d 596 (8th Cir. 1988).

a Missouri high school principal deleted two articles from a newspaper written and edited by students in a journalism class; one article was about teen pregnancy while the other dealt with a student's parents' divorce.⁵⁵ The Eighth Circuit had held that the student newspaper was a public forum for First Amendment purposes and the school officials were not justified in censoring the articles.⁵⁶

The Court distinguished *Tinker* from *Kuhlmeier* by stating that the issue was not as much the right of students to speak as it was the duty of school personnel to not promote particular student speech.⁵⁷ The Court recognized the authority of school administrators over school-sponsored publications and student activities that could reasonably be perceived to bear a school's "imprimatur."⁵⁸ Ultimately, the Court was satisfied that the First Amendment is not violated when school personnel exercise editorial control over the substance of school-sponsored publications if their actions are reasonably related to achieving valid educational objectives.⁵⁹

The *Kuhlmeier* Court added that narrowly tailored, content-neutral regulations as to time, place, and manner of expression *can* be enforced but only if the governmental interest in question is significant and alternative channels of communication are open.⁶⁰ The Court, in conceding that the public school a setting is a special context for First Amendment purposes, articulated that school personnel do not need to allow student speech that is inconsistent with the school's basic educational mission when the speech is sponsored by the school or is part of its

⁵⁵ *Id.*

⁵⁶ *Kuhlmeier*, 484 U.S. at 274.

⁵⁷ *Id.* at 271.

⁵⁸ *Id.* at 281.

⁵⁹ *Id.* at 260. In its analysis the Court reviewed different categories that it felt delineated free speech. The governmental power to regulate expression is most restricted on public property such as parks, streets, and sidewalks. According to the Court, the government may prohibit speakers from traditional public forums only when it is necessary to serve compelling state interests and only when doing so by the least restrictive means possible. *Id.* at 267.

⁶⁰ *Id.* at 267.

curriculum.⁶¹ Finally, the Court made a distinction between the assembly forum in *Fraser* and situations where school facilities and media are open for use by the general public, including student organizations.⁶²

Similarly, the Supreme Court definitively held in *Morse v. Frederick* that more traditional off-campus speech can be regulated when a student is off-campus on a public sidewalk, if the student is under the authority of the school at the time and is part of a school sanctioned event.⁶³ *Morse* arose when a student, during an Olympic torch relay through Alaska, waived a banner with the words “BONG HiTS 4 JESUS,” printed on it and was later suspended.⁶⁴ When the student challenged his suspension, the federal court in Alaska granted the school board’s motion for summary judgment, but the Ninth Circuit reversed in the student’s favor.⁶⁵ The Supreme Court, on appeal, reversed the decision and rejected the student’s claim that he was not engaged in school speech, noting that the event was sufficiently associated with the school.⁶⁶

The Court first noted that “there is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.”⁶⁷ The Court also observed that students’ free speech rights must be viewed in light of the “special characteristics” existing in a school environment.⁶⁸ Second, the Court ruled that *Tinker* is neither absolute nor the only basis on which student speech can be restricted.⁶⁹ Noting that the Court’s own Fourth Amendment jurisprudence understood the important, and perhaps even compelling, interest of educators to deter student drug use, the Court agreed that the principal acted properly in disciplining the

⁶¹ *Kuhlmeier*, 484 U.S. at 266.

⁶² *Id.* at 267.

⁶³ 551 U.S. 393 (2007).

⁶⁴ *Id.* at 408.

⁶⁵ *Id.*

⁶⁶ *Id.* In finding that the principal’s interpretation that students could perceive the banner as promoting illegal drug use to be reasonable, the Court relied on *Tinker*, *Fraser*, and *Kuhlmeier* in conducting the two-part analysis.

⁶⁷ *Id.*

⁶⁸ *Morse*, 551 U.S. at 408.

⁶⁹ *Id.* at 405.

student who displayed the banner.⁷⁰ The Court, however, did reject the school board's argument that the principal could have banned the sign under *Fraser*'s "plainly offensive" standard, reasoning that doing so would grant school officials too much authority.⁷¹

This comment will mainly address the question of whether secondary school administration should be able to punish student's vulgar speech or speech which is construed as cyberbullying through social media websites such as Facebook, Twitter, and their antecedents,⁷² when it is done off-campus and potentially from a home computer or device that is not connected through a district server. It is well settled that on-campus speech, (e.g. on school grounds or through a campus server) would fit into the traditional frame of the meaning of "within" the schoolhouse gate and would thus be punished like any other disruptive offense that occurs on school grounds.⁷³ The Court, instead held that the principal acted out of the school's legitimate concern of preventing the student from promoting illegal drug use.⁷⁴

The main argument of this comment is that secondary school officials should be permitted to punish student Internet speech, *even* when it occurs off-campus. School officials should be afforded this judgment without fearing a First Amendment action brought on behalf of the student,⁷⁵ when (1) the speech in question is reasonably related to the school in some way⁷⁶ and (2) when there is a likelihood that a "material disruption" will occur or has already occurred,

⁷⁰ *Id.* at 407, 409-10.

⁷¹ *Id.* at 408.

⁷² Many of the cases discussed at length/or which have dealt with this issue before are actually cases where the student speech in controversy or sought to be regulated were posted to MySpace, which had more of a rise in popularity in the late 1990s to early 2000s rather than the currently more popular Facebook or Twitter. *See* Ben Bajin, Could what Happened to MySpace Happen to Facebook?, TIME, Jul. 15, 2011, <http://techland.time.com/2011/07/15/could-what-happened-to-myspace-happen-to-facebook/> (the author argues that MySpace failed to innovate and serve its changing population and now is an outmoded form of social networking).

⁷³ *See* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969). Accordingly, school districts have the authority to mete out punishment when the cyberbullying occurs physically "on-campus" or through on-campus servers.

⁷⁴ *Id.* at 410.

⁷⁵ *Id.* at 627.

⁷⁶ The speech can be construed as being reasonably related if it is about another student, a teacher, the school itself or the administration.

under a good faith objective standard.⁷⁷ Allowing school officials to decide whether or not a “material disruption” has occurred, further capitalizes on the discretion, judgment and experience of the school administration. While it is true that the view advocated for in the past, detailing a more cognizable solution is to educate student’s on responsible technology and restrict speech less,⁷⁸ the growing statistics representing cyberbullied youth clearly indicates a need for stronger regulation.⁷⁹

In defining a material disruption, the Court must look at a variety of factors mostly relating to the character of the disruption, but should not be forced to wait until actual harm affects other students, the school, or teachers. In assessing and reformatting how the speech surmounts the “schoolhouse gate” and can be punishable even when originating off-campus, the *Tinker* test must be re-formatted to be applicable in a changing technological era.⁸⁰ Finally, if the action then progresses, the Court should balance the student’s free speech interests with the school district’s interests in providing an effective learning environment, but with a presumption weighing in favor of the school district.

B. Punishing Cyberbullying and the Need for a New Formulation of the Tinker Test

Once simply just a compound term created to give a name to a new form of Internet abuse, cyberbullying has reached an immense status in the United States. It is no longer a secret that the Internet allows students to both surreptitiously voice and widely disseminate their opinions, tastes, and frustrations to and about their peers. It is also increasingly apparent how the anonymous nature of the Internet can also provide a dangerous veil for students to hide behind as a means to bully not only each other, but also other members of their secondary school

⁷⁷ See *infra* Part III.A.2

⁷⁸ See Papandrea, *infra* note 196.

⁷⁹ See *infra* note 164.

⁸⁰ See Daniel, *infra* note 89 at 625. See also Student Comment, UPDATES TO MYSPACE AND THE SOCIAL NETWORKING WORLD, 16 B.U. J. SCI. AND TECH. 14, 18 (2010).

community.⁸¹ Similarly, when online abuse is directed toward teachers, it injures students' ability to learn by hurting teacher credibility and effectiveness in the classroom.⁸² When students bully and abuse each other, even in a cyber context, this behavior has the ability to distract from learning altogether and becomes a detrimental stumbling block in the way of furthering our nation's educational system.⁸³

This comment⁸⁴ promotes endowing schools with the authority to punish vulgar Internet speech when done off-campus when it meets certain threshold tests, which must be redesigned and adapted for the present era.⁸⁵ Part II will give an over-view of the jurisprudence regarding the right of a secondary school district to discipline student speech and the interaction with the student's first Amendment rights. Section III presents a proposed updated analysis⁸⁶ by first setting main recommended "guidelines" outlining when school districts should be allowed to

⁸¹ See *supra* note 20.

⁸² See Gail Masuchika Boldt, Paula M. Salvio, & Peter M. Taubman, *Classroom Life in the Age of Accountability*, Mar. 2009, Available at: <http://www.eric.ed.gov/PDFS/ED505851.pdf>. The authors describe the harm that comes from allowing students to post negatively about students, teachers, the school, or the school community as an injury to prestige and community values and thus teaching often does not receive the credibility as a profession in America as it does in other countries. *Id.*

⁸³ See Michael Ollove, *Bullying and Teen Suicide: How do we Adjust School Climate?*, THE CHRISTIAN SCIENCE MONITOR, Apr. 28, 2011, <http://www.csmonitor.com/USA/Society/2010/0428/Bullying-and-teen-suicide-How-do-we-adjust-school-climate>.

⁸⁴ It should be noted that many of the cases highlighted in this comment seem more about addressing the harm that occurs when a student has "bullied" a teacher or administrator via the Internet. While this seems to summarize an aspect of many of the cases that make their way to trial, it is just as promising to assess student speech in the context of peer bullying because it seems to be the "subset" of most concern. Many times, victims of student-on-student cyberbullying fail to bring or cannot bring suit against their tormentors, thus explaining the lack of documented case examples in some instances. Often, when a student commits suicide as the result of cyberbullying, the school district will have insisted that they could not mete out any punishment prior to the event, such as the case with Phoebe Prince's tormentors and the legal system is only resorted to for purposes of criminal charges or a wrongful death suit. See Kennedy, *supra* note 12.

⁸⁵ See *supra* Section A.

⁸⁶ Because of the general fear of "prevalence" of works written on the topic of cyberbullying and regulation I intend to define the contours of my discussion with precision. Frequently, the articles I came across were written at a much earlier date/before the latest holding on the most recent cases were handed down (on *Layshock* and *J.S.*) and thus their discussions/recommendations are now moot/no longer applicable. My note will only apply to the speech of secondary school students (public/or the public school context in general) and will not apply to college students, dorm activity, or the protection teachers have when they are the party initiating the online speech (teachers will obviously be discussed as victims of cyberbullying as that is what many of the cases turn on).

punish this speech. It begins with a proposed modification of the Supreme Court “*Tinker* Test”⁸⁷ for Internet speech cases. Section III further discusses how the test in its current form and the proposed re-formulation, affect administrative discretion over students’ education.⁸⁸ Section IV will consider how the proposed modification to certain “definitional deficiencies” existing in the *Tinker* test could also be implicated or rectified through legislation. Section V provides a discussion of how the Court should rule to redefine the test, should they choose to certify a case. Finally, Section VI will consider how the concept of the need for a new test interacts with the recent “bullying” legislation that is being proposed in various forms. It is lastly of great importance to consider the policy implications surrounding entities which argue for a crackdown with laws that adopt a “zero tolerance” approach and to consider the federal legislation has been proposed in various capacities.

The reformulation of the *Tinker* test will ultimately prove useful because the current iteration is overly complex⁸⁹ and does not provide specific definitions for certain key terms in the balancing test (i.e. material disruption, the schoolhouse gate begins and ends). This causes confusion for both courts in deciding the cases and school administrators in formulating their policies. In examining the reformulation of a student-speech monitoring test, the ultimate goal is to create a rule or law which effectively allows school districts and school officials to punish cyberbullying, while keeping students’ first amendment rights in tact. At its core, the purpose of

⁸⁷ *Tinker*, 393 U.S. 503, at 507 (holding that a school cannot punish student speech unless a substantial and material disruption occurred).

⁸⁸ This question, although asked before, comes now again at a very critical time, having even more relevance in the changing school regulatory climate of the present. The discretion and the question of allowing/disallowing punishment plays into an ongoing battle of what parts of education on school-wide/district level should be left to what level of discretion (and whose discretion).

⁸⁹ See Philip Daniel, *Bullying and Cyberbullying in Schools: An Analysis of Student Free Expression, Zero Tolerance Policies, and State Anti-Harassment Legislation*, 268 Ed. Law Rep. 619, 626 (2011) (providing an overview of cyberbullying attacks in the United States and recent updates in the law, however the piece does not include the Third Circuits most recent ruling on *Layshock* and *J.S.*). Daniel describes the decisions from the U.S. courts as having “constructed a jurisprudence for student free speech rights in the schoolhouse context that can be described as complex, somewhat dissociative, and perhaps contradictory.” *Id.*

any anti-bullying rule is the creation of an intimidation-free (and arguably more effective) learning environment. The formulation of the test as detailed in this comment is ultimately preferable, because it provides the necessary guidance lacking in the current iteration, with regard to the balancing of interests, materiality of the disruption, and the crucial question of the boundaries of the schoolhouse gate, as applied in a modern context.⁹⁰

C. What Exactly Constitutes Cyberbullying?: Definitions and Overview

Bullying is often defined as aggression that is repeatedly targeted toward an individual who has the inability to easily defend himself, with intentionality requiring some element of malice.⁹¹ Traditionally, the concept of bullying (in general) was student on student and punishable when done in an off-campus context.⁹² But the evolution of bullying as a power mechanism now reaches past the student-on-student context to include students bullying teachers, their administration, and initiating large scale school-wide threats.⁹³ Thus, in order to serve the purposes of rules, which can touch off-campus Internet speech thereby surmounting a First Amendment challenge by a student, one must analyze the “means” of bullying and the “place” of bullying to a much greater extent. One constant in the variety of existing cyberbullying definitions, is that the term still remains increasingly difficult to define.⁹⁴

The most comprehensive definition, to date, comes from a Canadian awareness website, articulating cyberbullying as “the use of information and communication technologies to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm

⁹⁰ See *infra* Part III.A.4

⁹¹ DAN OLWEUS, BULLYING AT SCHOOL: WHAT WE KNOW AND WHAT WE CAN DO 8 (Judy Dunn, 1993). Olweus goes on to explain that aggression is comprised of a single act, while bullying has the characteristic of repetition inherent in its definition. *Id.*

⁹² *Id.*

⁹³ See *supra* Section A.

⁹⁴ Julian J. Dooley, Jacek Pyzalski, & Donna Cross, *Cyberbullying Versus Face-to-Face Bullying: a Theoretical and Conceptual Review*, 217 J. OF PSYCHOL., 182, 184 (2009).

others.”⁹⁵ Because of the breadth of what the internet now contains, cyberbullying can currently include the degrading speech which occurs through social networking spaces (Facebook, MySpace, Twitter), emails, text messages, multi-media messages, instant messaging (AIM, Google Chat, Facebook chat), chat rooms and forum-board postings, and online phone services (such as Skype and video chat functions).⁹⁶ The setting for the bullying is therefore key, however imprecise the definition; cyberbullying takes place in cyberspace, a “decentralized, global medium of communication which links people, institutions, corporations and governments around the world.”⁹⁷

In both *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*, the Third Circuit ruled that derogatory profiles the respective students created about their principals and subsequently posted on MySpace⁹⁸ were protected by the First Amendment, occurring off-campus and thus could not be punished by the school district.⁹⁹ One of the issues faced by the court in *Layshock* was the fact that the student, Justin Layshock had used a school resource by lifting a photo of his principal off the school website and then coupled it with content from a survey, with all the “answers...based on the theme of ‘big’ because [the principal he was insulting] is apparently a large man.”¹⁰⁰ The court however, found that Justin’s “entry”

⁹⁵ Bill Belsey, THE PARTNERSHIP FOR BULLYING PREVENTION, <http://www.cyberbullying.ca> or <http://www.cyberbullying.org> (last visited Sept. 30, 2011).

⁹⁶ See Daniel, *supra* note 89 at 623. The author goes on to describe how it is the “medium of this bullying [as] what gives cyberbullying its unique name.” *Id.*

⁹⁷ DAVID SPERRY AND PHILIP T.K. DANIEL, ET. AL., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM 610 (Christopher–Gordon Pub., 1998) (quoting *ACLU v. Reno*, 929 F.Supp. 824, 831 (E.D. Pa. 1996)).

⁹⁸ See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205 (3d Cir. 2011) (Jordan, K., concurring), *aff’g* 496 F.Supp. 2d 587 (W.D. Pa. 2007).

⁹⁹ *Layshock*, 650 F.3d at 205; *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, (3rd Cir. 2011). The court in *Layshock* specifically asked: can the court punish expressive conduct, which originates outside the schoolhouse, does not destroy the school environment and is not related to a school-sponsored event. *Layshock*, 650 F.3d at 243.

¹⁰⁰ *Id.* at 210.

onto the website was not enough to be considered within the schoolhouse gates for the purposes of the Tinker analysis.¹⁰¹

The Second Circuit, faced with different facts, however, has (most recently in 2008) allowed a school to punish vulgar Internet speech by a student, even if the speech occurred online/off campus.¹⁰² In *Doninger*, a high school student council member posted a comment on her blog from a home computer, complaining about a school event, which was cancelled “due to the douche bags in central office,” and encouraging her peers to do the same.¹⁰³ The school district received various phone calls, some from upset students who had followed the blogs directives.¹⁰⁴ As a result, the student council member who had written the blog was prohibited from running for student council in the future.¹⁰⁵ In her First Amendment challenge, the Second Circuit found that the school district had the authority to punish the student and even though the post was created off-campus, because the post, “foreseeably create[d] the risk of substantial disruption within the school environment.”¹⁰⁶ The result is seemingly incongruous. The Second Circuit has allowed school officials to punish off-campus student speech and thus afforded it no protection, even when only based on hypothetical results. The Third Circuit, in contrast, has refused to punish speech even where, arguably, harm has already occurred.¹⁰⁷

Both tests derived their essential reasoning by using the original, and oft-challenged, test as set down in the Supreme Court in *Tinker*. As discussed above, while this comment advocates generally for the reasoning set forth by the 2nd Circuit court in *Doninger*, it also attempts to

¹⁰¹ *Id.* at 232.

¹⁰² *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008).

¹⁰³ *Id.* at 45.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 50.

¹⁰⁶ *Id.* The court went on to affirm that it was, in fact, reasonably foreseeable that “administrators and teachers would further be diverted from their core educational responsibilities by the need to dissipate misguided anger or confusion over [the event’s] purported cancellation.” *Id.* at 51-2.

¹⁰⁷ See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205, 207 (3d Cir. 2011) (Jordan, K., concurring), aff’g 496 F.Supp. 2d 587 (W.D. Pa. 2007); see *J.S.*, 650 F.3d at 920.

advance a more workable, new “test” which focuses on the context and online forum of the students’ speech as well as where the speech is directed, driving the reasoning away from any “tests” that may have been suggested before. This comment also delineates how and when certain student speech is no longer considered “protected” and how the courts can effectively surmount the First Amendment challenges that will inevitably arise.

Scholars, student authors, and theorists alike frequently have alleged that a new approach is needed to the underlying problem either through the courts, legislature, or school districts themselves.¹⁰⁸ But few of these theorists have actually even attempted to *articulate* what they feel the new test, law, or school policy should be. One exception to this generality is the view posited by Thomas Wheeler, the author of an article which appeared in the 2011 winter publication of the Pace University’s Law Review, which advocated for a “magic bullet theory” to resolve the cyberbullying punishment issue.¹⁰⁹ Wheeler’s test, however, is ultimately unhelpful, for a variety of reasons. First, Wheeler argues within his article that the moment of creation of the student speech is irrelevant, and the focus of any new test should be the access, which can be achieved at school.¹¹⁰ While it may be correct that the speech should be punished if it is accessed at school, one cannot simply disregard the moment of creation. Creation is essential and relevant, considering the speech’s eventual on-campus dissemination, in light of the fact that many schools today retain sophisticated blocking applications upon their servers.

The heading of this section refers to this minor phenomenon as “the same thing over and over again,” because it is interesting and perhaps even indicative of the need for the solution in

¹⁰⁸ See Thomas Wheeler, Facebook Fatalities: Students, Social Networking and the First Amendment, 31 PACE L. REV. 182, 227 (2011); See also Clay Calvert, Punishing Public School Students for Bashing Principals, Teachers and Classmates in Cyberspace: The Speech Issue the Supreme Court must now Resolve, 7 FIRST AMEND. L. REV. 210, 252 (2009).

¹⁰⁹ Wheeler, *supra* note 28, at 184. Wheeler argues that across the spectrum of cases, *Tinker* can be properly applied in certain circumstances. *Id.*

¹¹⁰ *Id.* at 215.

this realm of the law.¹¹¹ It seems, at least from a distance, that many scholars are willing to openly discuss the fact that the United States educational system has a problem in this area -- and yet no one is willing to propose a more definite solution. Could it perhaps be because theorists and lawmakers alike are afraid to disrupt the delicate balance and supposedly “time-tested” interworking of the *Tinker* test? Or perhaps the fear can be explained through the notion that reducing the protection surrounding student Internet speech as it relates to school-matters has the potential to lead to a slippery slope, where censorship abounds and online privacy for students, teachers and school administrators alike fails to exist. By monitoring Internet activity, are we not reducing cyberbullying, but actually hindering the creativity and minds of our youth? While conceivable, each of these concerns can be addressed and the distress conjured can be allayed through a most careful drafting of a new rule, accompanied by an instructional means of implication. Yet the hesitance and the *Tinker* test remains, leading this author to bluntly ask, what is our legal system afraid of?

D. From Tinker Forward: A Progression and Overview of Cases and Terms

While a progressive overview of the body of case law surrounding the First Amendment jurisprudence regarding protected student speech has already been engaged in above, a review of the terminology of cyberbullying, forming the background and support for the proposed solutions to the problem of off-campus cyberbullying is also instructive. As was previously mentioned, the court in *Tinker* first promoted the “material and substantial” disruption test, with regard to students wearing black armbands to school in protest of the Vietnam War.¹¹² But it is indeed highly possible that the Supreme Court Justices, who decided *Tinker* in 1969, could have

¹¹¹ The pieces frequently begin by citing a recent incident, followed by (in some cases) a discussion of the progression of the cases dealing with the student speech and the progeny of *Tinker* and finishing with a generalized recommendation that the way the law and society thinks about/deals with cyberbullying needs to change.

¹¹² *Tinker*, 393 U.S. 503, at 507.

never contemplated the growth and change, altering the landscape of what is defined as student speech. Subsequently, the Supreme Court determined that the schools were truly instruments of the state and thus may determine that the essential lessons of “civil, mature conduct cannot be conveyed in a school that tolerates...offensive speech and conduct.”¹¹³ Later, the Third Circuit, interpreting the holding in *Bethel*, determined that there is no First Amendment protection for lewd, vulgar, indecent and plainly offensive speech in school.¹¹⁴

E. Bullying vs. Harassment: The Subtle Differences

Janis Wolak’s famous 2007 study suggested that it is much more accurate to consider “repeated acts of online aggression as online harassment.”¹¹⁵ Wolak and her research team initially argued that online harassment was far easier to terminate than face to face bullying, as a website is much easier to take down, but later added that there are instances where tracking the bully to a website and then removing the harassment could be extremely difficult.¹¹⁶ In general, while it might be somewhat early to identify “trends” in this area (as to the character of cyberbullying as an overarching principal), it is at least reasonable and worth noting that cyberbullying differs greatly from normal face to face bullying in its ability to reach large numbers of people. In one notable psychology study, the comparison between cyberbullying and face-to-face bullying was broken down into the categories of the imbalance of power and the repetition of the bullying done over time.¹¹⁷ In this case, “scope” means that in the past, bullying was done face to face and the maximum audience were those who were immediately present or

¹¹³ *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 678 (1986). The court in *Fraser* distinguished a student’s high school nomination speech at a school assembly, which included a graphic sexual metaphor as punishable from the black protest armbands in *Tinker*. *Id.* It is possible that this disparity results from the ‘who’ who is promoting the speech, an adult in one case and a child in the other.

¹¹⁴ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001).

¹¹⁵ Janis Wolak, J.K. Mitchell, & D. Finkelhor, *Does Online Harassment Constitute Bullying?: An Exploration of Online Harassment by Known Peers and Online-Only Contacts*, J. OF ADOLESCENT HEALTH, S51, S55 (2007).

¹¹⁶ *Id.* at S57.

¹¹⁷ Julian J. Dooley, Jacek Pyzalski, & Donna Cross, *Cyberbullying Versus Face-to-Face Bullying: a Theoretical and Conceptual Review*, 217 J. OF PSYCHOL., 182, 184 (2009).

who then would be drawn to the crowd or spread rumors. Although it may seem self-obvious, it is clear and must be mentioned how cyberbullying and bullying which takes place through an internet forum has a much broader scope,¹¹⁸ can reach more audiences, and can alter a student or teacher's public image within mere moments of its upload. The spreading of the speech then becomes an even more crucial issue. When students not only "tag," post, share links, text, or even in this case as well, share the medium through word of mouth—rapidity gives way to an immediacy of impact.

F. The "Point" of School Discipline

While performing an overview of the law in this domain, it is important to note the extent of a school's ability to discipline its students' off-campus speech/activity as given a grant of authority to punish by state law. Further, what is the *point* of school districts being able to punish off-campus Internet speech when/if it falls within the proper domain of the law? At its core, the purpose of disciplining students for cyberbullying within schools is to promote good citizenship and help foster/create a learning environment with the ability to reach an optimal use of school resources. By reducing threats and hindrances in the form of distractions, educators can promote school communities that are allowing the maximum number of students to learn and grow into the type of "future" leaders and contributors we desire as a population.

III. COLLISION, DE-INDIVIDUALIZATION, DISCRETION AND BALANCING: WALKING THE TIGHTROPE TO A NEW TEST

The main overarching problem that seems to occur when coping with the cases and legal incidents surrounding cyberbullying, is how the rules, laws, and judicial standards as set by the

¹¹⁸ *Id.* The authors argue that it may be the technology and the "specific features of the content initially published—not the initial perpetrator's intentions and behavior," which define the degree of severity of the cyber-bullying. *Id.*

federal circuits, either align or collide with a student's first amendment rights.¹¹⁹ This comment outlines a variety of potential solutions; however they can each be summarized briefly as part of an overview in context of the trajectory of the overall argument.

First, there is the position that the Court need not scrap the *Tinker* test entirely, but update the formula in its next major hearing concerning student Internet speech. This alteration of the test should conform to the growth, which has occurred via technology, changing the nature of the speech in general.¹²⁰ In this reformulation, the balancing test of interests (school district and student's) must be updated and certain definitions, which compose the test, must be redefined in light of the present advances in technology.

In contrast to this judicial remedy, there is a second possible solution, involving school districts across the nation taking the initiative to train and educate their students on internet speech and behavior, within the interaction of an anti-bullying program and a fair use policy.¹²¹ Proponents of this alternative see such school-district initiatives as pre-emptive strikes on cyberbullying or student speech. While school administration authored policies are perhaps a step in the right direction, they also could become problematic by limiting student-speech in such a way that students refuse to "sign" the codes of conduct they are embodied in, further giving parents the impetus to sue. A third solution, which may encompass pieces of the pre-emptive attack, is the use of cyberbullying legislation to solve the problem. A number of states have adopted these types of laws, which may operate on a district level; however there is yet to be a federal statute that deals directly with the specific regulation and punishment of cyberbullying.

As a starting proposition, one of the most convincing arguments comes out of Judge Kent Jordan's concurrence in *Layshock*, where the Third Circuit Judge opines, "to the extent it appears

¹¹⁹ See Daniel, *supra* note 89 at 626.

¹²⁰ See *id.*

¹²¹ See Interview with Bowen and Wehr, *supra* and accompanying text.

we have undercut the reasoned discretion of administrators to exercise control over the school environment, we will not have served well those affected by the quality of public education, which is to say everyone.”¹²² Jordan goes on to further explain that, although the Third Circuit has not said that *Tinker* is inapplicable to off-campus speech simply because it is done off-campus, he has a fear that the court’s decision would send a message, that “anything goes” in terms of non-punishable internet student speech.¹²³ Proponents of wide discretion for school districts view this specific piece of Jordan’s concurrence as his expression of (albeit tentative) support for school administrative efforts to maintain order. Jordan’s support only extends though when the student speech gets to the point where it becomes, “a potent tool for distraction and fomenting disruption,” as it arguably did in the case of *Layshock*.¹²⁴

In agreement with Judge Jordan’s rationale, it is arguable that the *Tinker* test should continue to be used as a means to gain order arising out of a balance in schools with respect to student free speech.¹²⁵ While it is not plausible that an approach should be taken which allows excessive rigidity and school district discretion, effectively reducing each student to just “Another Brick in the Wall,”¹²⁶ courts must be mindful of the challenges that school officials face. Teachers and administrators alike bear the weight of such tasks as promoting a safe learning environment, being mindful of student welfare, and creating a culture, which is most conducive to noticeable gains.

A. *Rebooting Tinker for the Technological Era*

¹²² *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205 (3d Cir. 2011) (Jordan, K., concurring), aff’g 496 F.Supp. 2d 587 (W.D. Pa. 2007).

¹²³ *Id.* at 251–252.

¹²⁴ *Id.* at 252.

¹²⁵ *Id.*

¹²⁶ See PINK FLOYD, *Another Brick in the Wall*, on THE WALL (Columbia Records 1979).

The *Tinker* test, which implies a weighing approach,¹²⁷ exudes timelessness in some contexts, but truly needs to be re-evaluated for the technological times. This is not to say that the Supreme Court should endeavor (if and when it decides this issue before the legislation tackles it first) to completely over-rule the *Tinker* test. Rather, it should be “updated” and re-evaluated in the next case the Court chooses to hear, with the ultimate goal being an adaptation to the test’s parameters in the context of cyberbullying occurring off-campus. Of course there will be dissident voices to this approach, but the technological world is rarely reinvented without such outcries of dissent.¹²⁸

1. Part I: Update to the Balancing Test

First, the “balancing” element of the test should be ultimately kept, but should specifically include new factors and be restructured as to how the test functions in application. In matters of application, it is instructive to note how the field of employment law applies its own First Amendment tests to the similarly situated matters of employee-protected speech within the workplace. While employment law may seem an unlikely candidate from which to “borrow” instructive legal applications, casebook author and expert on private ordering within employment

¹²⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 510 (1969). The opinion specifically describes how “[students] may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Id.*

¹²⁸ For example, in every instance that Facebook changes its interface/design, there are immediate online outbursts of negative reactions. While this specific social networking sites is a free form of expression that no one is forced to use, the analogy illustrates a point. In the past, federal courts relied on the security and expectations of the *Tinker* test in deciding bullying litigation on the secondary school level. But this is not to say that if the test were slightly altered to reflect the evolving world that it would render it useless and “users” i.e.: the courts, schools, and the public would abandon it altogether in favor of something else. Generation Y users have had Facebook since 2005 or earlier, just like the courts have had *Tinker* since 1969. When Facebook changes, we grumble, post our outrage and clumsily learn the new applications, but within months hardly notice the adjustments to this constant presence in our lives. While this analogy may be slightly mismatched to the application of judicial test, the point the author is trying to make is that while there may be a period of adjustment using “*Tinker* 2.0,” the legal community will adjust and find no need to completely abandon something just because the interface looks a little different.

Timothy Glynn suggests that similarities exist between the two fields regarding issues of cyberbullying.¹²⁹

With that in mind, some analogous employment law formulas have been borrowed in the formation of the proposed test. The balancing test will retain the essential concept of weighing the school's interests with the student's first amendment rights/interests, however, it is apparent that the factors which must be considered in the weighing process must be redefined and in some cases added. On the student side, many of the questions (such as factors 1 and 2), really first ask if the student's speech was actually bullying (regardless if it was toward a school personnel or a student) or of a vulgar nature.¹³⁰ The factors will not line-up evenly within the test, as the student's interests have more categories to consider. Accordingly, more weight should be given to each of the school district factors as a general proposition. The purpose of such weighting, is to give the school district the presumption of discretion, unless the student makes a substantial showing and can prove that many of the factors weigh in his/her favor.¹³¹

2. The School's Multi-Factorial Interests

At the outset, it is helpful to consider that the individual schools or the school districts have several interests that must be considered and served, thus creating a multi-factorial aspect of the test. With regards to factor one, the original starting point of *Tinker*, should be kept, with the fact finder asking "Does the speech cause a substantial, material disruption?" A reoccurring

¹²⁹ Timothy P. Glynn, Professor of Law, Seton Hall Univ. Sch. of Law, Employment Law Class Lecture on Workplace Harassment and Employee Causes of Action (Sept. 27, 2011). In his lecture, Glynn further noted that while workplace bullying has not evolved in its protectionist measures with regard to the workplace, considerable growth had been seen in the adoption of cyberbullying measures in the realm of education, which certain individual workplaces have chosen to adapt internally. *Id.*

¹³⁰ Although this is a question which seems like a threshold issue, it is the manner and exacting way in which the question is asked which will further this inquiry.

¹³¹ Each factor does not necessarily need to be met, and that fact that one is not, is not dispositive of the court still being able to find either a situation where punishment is allowed or in which the First Amendment is protective. It is for the discretion of the court to decide within the new framework as established. It should also be noted that many of the factors overlap and interact, so thus, as of now I see no specific reason to mandate that there must be a specific order in which the court examines them. This may of course, change as my inquiry and research further progresses.

issue between the federal courts as to what constitutes a “substantial disruption” of the school environment,¹³² which factors into the struggle of achieving an appropriate and effective balancing test. First, it is imperative that (as factor 3 will also show) a school can and should be able to take action pre-emptively, even before a substantial disruption occurs. School administrators frequently “bear the brunt of setting and enforcing their own cyberbullying rules, a daunting challenge given the current breadth and depth of student free speech rights.”¹³³ One main goal of the reformulation should make it clear that this burden is slightly alleviated. If the school officials, in their best judgment, feel that a disruption could be imminent if the Internet student speech becomes widely disseminated amongst the student population, they should have the discretion to discipline the student. Even if it has yet to cross the bounds of the schoolhouse gate, school officials should be permitted to act.

When examining the material disruption itself, one must first consider what the “nexus” is between the speech and the school. Is it such that a reasonable person can easily identify a strong and pervasive connection between the two, so that the school (in general/many facets) could be seen as having been impacted by the speech?¹³⁴ In the past, courts have found that simply because students discuss the speech in class or in school, the underlying Internet content

¹³² See *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205, 212–213, (3d Cir. 2011) (Jordan, K., concurring), aff’g 496 F.Supp. 2d 587 (W.D. Pa. 2007). After word broke out about the profile, the school’s technology department attempted to disable the profile unsuccessfully, whereupon certain computer classes then had to be cancelled, computer labs shut-down, and schedules rearranged for several days. *Id.* It is arguable that this amount of reactionary work by a school district would, in fact, constitute a substantial disruption. The Hermitage School district, however, conceded that Layshock’s actions did not cause a disruption and the court refused to allow the school district to punish speech that was made from the creator’s grandmother’s home computer, a place where he was ultimately protected by the First Amendment. *Id.* Had the school district not made this concession, the outcome may have been drastically different.

¹³³ Daniel *supra* note 89 at 627.

¹³⁴ This also will play into “Factor 1” of the student side of the balancing test. In understanding the student’s purpose of the speech, the court or lawmaker will need to explore the connection between the speech and the school, with an eye to intended and actual impact and how closely connected the speech may be to the reality of the school-world. For instance, if a student is speaking out about something which is actually occurring and is harming students (perhaps such as a dangerous physical condition in a building), the nexus is clear but the speech was not intended to bully, but rather inform and correct.

does not constitute a material disruption.¹³⁵ Similarly, the disruption must rise beyond merely upsetting the staff due to the content of the speech to be considered “material”.¹³⁶ While a student’s mobile tweet mocking the governor on a school field trip to the capital may be embarrassing to the school district,¹³⁷ it is far less disrupting than invidious comments about race, gender, religion or even personal threats on a teacher. This again presents a difficult stumbling block, which must be surmounted in the proposal of a new test. If it can be proven that the cyberbullying speech is upsetting a student or a teacher to the point that the learning environment is materially impacted, (e.g. the student or teacher is unable to function), would that justify a legal finding of a material disruption?¹³⁸ Most likely the answer would be yes, however this query seems to require more of an examination into the reasonableness of the situation on a case-by-case basis.

A third question to be asked: Does the speech create a “reasonable apprehension” (in the best judgment of the school officials, using their experience in education and in their capacity as the initial authorities who have professional knowledge with which best to judge the event of the student speech) that a disruption will occur in the learning environment as a result of the speech?¹³⁹ More simply put, this standard gives the court leave to assess whether or not the school administration had a good faith, objective belief that the speech would disrupt the school environment. This factor has, in the past, been defined as if the student Internet speech could

¹³⁵ J.C. ex. Rel. R.C. v. Beverly Hills School Dist., 711 F.Supp. 2d 1094 (C.D. Cali. 2010).

¹³⁶ See Beussink v. Woodland, 30 F.Supp.1175 (E.D. Mo. 1998).

¹³⁷ Mara Rose Williams, *Teen’s Joking Tweet on Topeka Trip Creates a Capital Fracas*, THE KANSAS CITY STAR, Nov. 23, 2011, <http://www.kansascity.com/2011/11/23/3283680/students-joke-creates.html>. After listening to a speech by Governor Sam Brownback, high school senior Emma Sullivan tweeted, “Just made mean comments at [sic] gov. brownback and told him he sucked, in person #heblowsalot” *Id.*

¹³⁸ The other side of this view is that interferences, which supposedly impact the other rights of students, such as the right to a free learning environment, are frequently given too much weight in situations such as this. See CAMBRON-MCCABE, N., MCCARTHY, M., & THOMAS, S., LEGAL RIGHTS OF TEACHERS AND STUDENTS 290 (Allyn & Bacon, 2nd ed. 2009).

¹³⁹ See *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001). The Saxe court held that if school officials can point to a well-founded expectation of disruption, a restriction of the speech may pass. *Id.*

potentially make its way to the school campus in a “foreseeable” manner. Again, though, there is a problem of what constitutes “foreseeable” as no court has ever strictly defined the term, only given examples.

The Western District of Pennsylvania and the Central District of California have each found that communicating existence or knowledge of the cyberbullying to another student by the creator off campus, makes it foreseeable that the speech may make its way to the schoolyard and cause a substantial disruption.¹⁴⁰ While common sense notion behind this test for assessing the chance that the speech may cross the “schoolhouse” gate is reasonable, the term “foreseeability” should defined in more definite terms. The threshold question then becomes: Do the school administrators or officials dealing with the speech have a well-founded belief that it will cause a disruption? This prediction or belief may be influenced by past-experiences school administrators have seen or have learned through district and state specific professional trainings that have urged them to target these kinds of behaviors as bullying. In order for the belief to be “reasonable” the likelihood of a disruption needs to pass a certain threshold: it needs to be not just possible, but probable that a disruption will occur.

The court in *J.S.* seemed to promote the idea that student speech could be “so outrageous” that it was essentially easy to detect that it lacked sincerity.¹⁴¹ This creates a great matter of perplexity, as it becomes increasingly difficult to determine how one would “know” if the student was serious or not. For example, the school district might perceive the speech as an empty threat, a student simply venting his frustrations, or as a vehicle of humor. When Emma Sullivan made the aforementioned tweet about her state’s governor, she claims the message “was

¹⁴⁰ See *Killian v. Franklin Regional School*, 136 F.Supp.2d 446, (W.D. Penn. 2001); see also *J.C. ex. Rel. R.C. v. Beverly Hills School Dist.*, 711 F.Supp. 2d 1094 (C.D. Cali. 2010).

¹⁴¹ *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 923 (3rd Cir. 2011).

harmless...[and that it was] not like [she] was really fired up about anything [Governor Brownback] said.¹⁴² Accordingly, “believability” within the test should perhaps be tied to the credibility of the threat: it does not matter if the threatening behavior is outrageous as long as it can perhaps be grounded in some fact or is perhaps an action that a student might be reasonably capable of committing. It is most likely best however, that the school administration err on the side of caution, as it is apparent from past tragedies¹⁴³, that students are frequently capable of even the most destructive events.¹⁴⁴

Finally, as part of the fourth element, the fact finder must ask: does the speech cause an invasion of the rights of others? In summation, the appropriate test is that which was originally laid down in *Tinker*, plus a critical analysis of the facts surrounding the speech, might reasonably lead a school district to foresee material interference with the learning environment.¹⁴⁵

3. Contrasting the Students’ Interests

Before even examining the factors to be weighed in the students’ favors, One might ask: are there other/better formulations of first amendment rights/incorporative tests out there that can be used to model what should *actually* be considered in this case? First, one must consider the nature and character of the speech, meaning the actual topic the speech concerns. The speech should be particularly flagged as potential cyberbullying if it is critical or disparaging of another student, a teacher, or the school administration in general. Depending on the nature of the

¹⁴² Williams, *supra* note 137.

¹⁴³ Specifically, when one envisions tragedies in a school setting, the horror that occurred at Columbine High School is often in the forefront of one’s mind. On April 20, 1999, the Colorado high school was the scene of a shooting rampage by the deeply disturbed, and now infamous, student duo of Eric Harris and Dylan Klebold. Although it is theorized today that the pair’s rage was fueled by greater psychotic vengeance, peer bullying also factored into the young men’s devastating act. See Curtis Wilkie, *The Depressive and the Psychopath: At Last we Know Why the Columbine Killers did it*, SLATE, Apr. 20, 2004, http://www.slate.com/articles/news_and_politics/assessment/2004/04/the_depressive_and_the_psychopath.html.

¹⁴⁴ Wheeler, *supra* note 28.

¹⁴⁵ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

criticism, this could rise to the level of a material disruption to the school environment, by drawing attention to the critique or by inviting other students join the “speech” or “speaker” in his views. In assessing the speech, it must be clear to the fact finder that a reasonable student of a similar age (or even a reasonable person of any age) would find the speech insulting. In the alternative, if it was meant in jest, would an individual of a similar age be able to construe it as a joke and the intent was not serious? Furthering the inquiry: what is the forum of the speech and how accessible is it to others? If, for example, speech was created on a Facebook wall, many students may have access to it just by being in the same “network,” because they attend the same school. Or is the speech on something akin to a blog, where access can be restricted and only certain selected (perhaps by the author) students can view? What is the quality of the speech? Was time spent detailing specific threats or potential future incidents of bullying or was the speech just a brief outcry against an immediate school occurrence? In addition, to whom was the speech directed? Is there more of a reason to protect against student-on-student cyberbullying as opposed to student-on-teacher/administrator? As between a cyberbullied student versus a teacher, one cannot weigh heavier than the other, in terms of whom the school should provide more protection, as both could have a substantial impact on the school’s learning environment. While the focus should, at all times, remain on protecting the students, the court must consider the teachers and administrators safety as well.

In the second factor, the courts must consider the purpose of the speech. In exploring the purpose of the speech, evidence that a student-made website was accessed while at school, through a school server, or that the intended audience was the students of the school, can lead to the finding that the speech is on-campus in nature.¹⁴⁶ If one of the purposes of the student speech was to have an audience of other students, then it should be within the school’s discretion

¹⁴⁶ J.S. ex real v. Bethlehem Area S.D., 569 Pa. 638, (Pa. 2002).

to punish the off-campus speech, as it is clear the student intended to disseminate a view with a goal of disruption in mind.¹⁴⁷

The online publication of the speech on the school grounds may lead to a widespread lack of respect, diminishing the credibility of the learning environment or incite fear and create worry by allowing one student to spread a message of hate and intimidation about another student or teacher. The counter-argument to this will of course be, perhaps that the student was just attempting to share a joke or a point of view.¹⁴⁸ The purpose and the true intent behind the speech must be examined within the context of a reasonable person's interpretation, while at the same time continuing to be mindful that no threat should be underestimated given the current state of the educational system and the violence that has occurred in the past.¹⁴⁹

Next, the court should inquire whether there a causal connection between the cyberbullying and Internet speech to other school issues or behavioral problems rendering speech clearly retaliatory?¹⁵⁰ The purpose of the student speech may also be evinced by the student's intent in creating the speech. The court needs to determine if the speech was posted as a joke, a rebellion, or perhaps a protest against the actions of a peer or the school district. Further, the dissemination as informed by privacy settings and accessibility of the content may also give clues as to the purpose of the speech. The ability of others to have access to the internet speech and the likelihood that others will see, along with the general question of *who* these other

¹⁴⁷ See e.g. *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205, 212 (3d Cir. 2011) (Jordan, K., concurring), *aff'g* 496 F.Supp. 2d 587 (W.D. Pa. 2007). Justin Layshock initially only allowed his friends access to the fake MySpace profile; when word spread others requested to be linked to the site as well, a fact that arguably shows that the student desired an audience for his speech.

¹⁴⁸ *Id.* For example, in *Layshock*, Justin Layshock admitted that he used a school computer to access the fake MySpace profile in an attempt to disable the site. This post-creation action was used as evidence that it was clear Layshock was only joking and he further realized that his "joke" had gotten out of control.

¹⁴⁹ See Wilkie, *supra* at note 143 and text accompanying.

¹⁵⁰ *Layshock*, 650 F.3d at 212. The school punished the student in question (Justin Layshock) for a dress code violation only months before he made the fake profile at issue. *Id.*

individuals are (friends, school officials, the community, or anyone in the world), are critical in answering this question.

Third, one must consider the “voice” of the speech and question from a societal point of view, whether this is the kind of speech the American public deems worth of protection. For example, if the student is acting in opposition to a school district practice,¹⁵¹ could the speech be construed as a form of political expression or an expression of freedom from some type of oppression? Generally, speech furthering a political expression or an expression of freedom is one that the First Amendment was specifically designed to protect and is entitled to the ultimate protection.

Finally, the finder of fact must consider if stifling this student speech is chilling to First Amendment rights or the essential expressions that fosters the growth of a young mind. This factor also will assess, in part, the negative further-reaching consequences of allowing the student speech to exist in its current form. It would be useful, at this point, for the court to consider the impact of the speech on the community and school moral, or even the credibility of the educational profession in general. Perhaps this is a factor that is best assessed in terms of the societal effects of allowing or disallowing the student speech. The goal of many school districts is to raise and educate good citizens¹⁵². Thus, the court should consider the importance of that goal, without becoming too far attenuated from the issue (the impact of cyberbullying) at hand.

4. Part II: How Should the Court Deal with the Definitional Problem of the “Schoolhouse Gate”?

¹⁵¹ See *Doninger v. Niehoff*, 527 F.3d 41, 51 (2d Cir. 2008).

¹⁵² While possibly farther than the immediate future, it may be important for the finder of fact to consider the potential impact the speech may eventually have on the American workplace as a whole. By setting specific behavioral and speech expectations with students in the present, it may be difficult to attempt to predict how the students will then act and carry these goals over into their adult lives. By instituting the practice of tolerant Interaction early, however, perhaps future generations of Americans will live in a cyberbully-free world or at least one where the consequences of their actions are clearly known not matter the content of the Internet speech or the location of its creation.

Although it now seems that speech occurring outside the schoolhouse gate is no longer barred from the arm of school discipline, some of the reasoning used by the Third Circuit in the recent cases makes it apparent that the location of the speech's creation is a component that the court should consider in making its ultimate decision on whether the speech is susceptible to punishment. The majority in *Layshock* admitted the fact that it is "now well established that *Tinker*'s 'schoolhouse gate' is not constructed solely of the bricks and mortar surrounding the school yard. Nevertheless, the concept of the 'school yard' is not without boundaries and the reach of school authorities is not without limits."¹⁵³ The *Layshock* court particularly expressed concern of the "unseeingly and dangerous precedent" which could be created by allowing the state, through the arm of the school, reach into a student's home and control the child to the same extent the child could be controlled at school.¹⁵⁴ Thus, the Third Circuit adopted the position that schools could punish the expressive conduct "that occurs outside the school, as if it occurred inside the 'schoolhouse gate,' under certain very limited circumstances," none of which were identified in the instant case.¹⁵⁵ Given the examples the court cites, the limited circumstances seem only to be categorized as student Internet speech promoting disruptive conduct or issuing threats upon specific individuals.¹⁵⁶

¹⁵³ *Layshock v. v. Hermitage Sch. Dist.*, 593 F.3d 249, 276 (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205 at 242 (3d Cir. 2011) (Jordan, K., concurring), aff'g 496 F.Supp. 2d 587 (W.D. Pa. 2007). Because Justin was sitting in his grandmother's house at her computer when he created the page, the court found that, "allowing the district to punish [this] conduct . . . violated the First Amendment guarantee of free expression." *Id.* at 277. Simply because the speech "wound up" in the school through other students attempting to access it was not enough, with the court asserting the relationship between Justin's conduct was too attenuated. *Id.* at 276.

¹⁵⁴ *Id.* at 277.

¹⁵⁵ *Id.* at 253.

¹⁵⁶ See *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002)(school could punish student for creating website off campus explaining reasons why a teacher should die frightened students and parents and caused the teacher to take a medical leave, 3 substitute teachers called in disrupting the student educational process); see *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F. 34 (2d Cir. 2007)(student's off-campus created drawing of a teacher being shot and the words 'Kill Mr. VanderMolen,' which he sent to 15 students through instant messenger, also off campus, was punishable as it was deemed reasonably foreseeable that the image's transmission would substantially disrupt the work and discipline of the school); See also *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008).

Instead, the Supreme Court should update this piece of the test, with the aim of defining the schoolhouse in more modern terms, perhaps even considering what composes the “virtual schoolhouse,” moving the boundaries to reflect the modern technological realities that exist.¹⁵⁷ For example, in California, a district court decided that speech-forum (where the speech was created) and who eventually had access to the speech was much more important than the geographic origin of the speech, meaning the location where the speech became “live” in terms of social media access.¹⁵⁸ Next, it is no longer feasible for courts to aver that student speech created at an off-campus computer, but later accessed from a school computer is not punishable. Courts should uniformly recognize that on campus access of off-campus speech creates a foreseeable risk of a substantial disruption to the school environment¹⁵⁹ for two reasons. First, on campus access creates an immediate potential for distraction, disobedience and negative response to the speech-target; and second, because the speech and the cyberbullying it encompasses have *crossed* the school grounds at the precise moment of access.

Similarly, it seem preposterous that when Justin Layshock went on to the MySpace webpage he created from a school computer and changed the settings,¹⁶⁰ it did not constitute an action, such as a re-publication, which occurs on-campus and within the schoolhouse gate. This mandates that the test, in light of the digital age, must now examine when a digital action starts or begins in time, potentially almost as if one were examining the action under stimulus-response theory.¹⁶¹ In a stimulus-response setting, the theory of conditioning deems a response followed

¹⁵⁷ See Daniel, *supra* note 28 at 624. Daniel further explains how cyberbullying in certain cases, “yield[s] the power to communicate private aspects of [students’] li[ves] to the entire global Internet community.” *Id.*

¹⁵⁸ See *J.C. ex. Rel. R.C. v. Beverly Hills School Dist.*, 711 F.Supp. 2d 1094 (C.D. Cali. 2010).

¹⁵⁹ See *J.S. ex real v. Bethlehem Area S.D.*, 569 Pa. 638, (Pa. 2002).

¹⁶⁰ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205, 242 (3d Cir. 2011) (Jordan, K., concurring), *aff’g* 496 F.Supp. 2d 587 (W.D. Pa. 2007).

¹⁶¹ The core of the “Behaviorism” school of thought espouses the view that learning processes can be studied most objectively when the focus is on stimuli and responses. See J.E. ORMROD, *HUMAN LEARNING*, (Prentice Hall, 3rd ed.

by a reinforcing stimulus is strengthened and more likely to occur again.¹⁶² With respect to emails and texts, there is a distinct time of sending and a time of receipt—when, at that moment the specific message “hits” the reader and is absorbed by him or her.

MySpace and Facebook,¹⁶³ on the other hand, are more like the technological equivalent of living organisms—changing, growing, and having the ability to have its user manipulate it to respond. The profile, once formed, changes in a manner that does not fit easily in a stop-and-go schema, unless we isolate each little change, post, tweet, and tag. But even if we do isolate each minute action, the change to the MySpace profile in *Layshock* would then fall within the bounds of *Tinker* as one little piece of creation occurring within the school grounds. The point of a social media profile is not its initial creation, it is what the user then does with the profile: how he or she nurtures it, grows what it contains (photos, comments, posts), and raises it to become a manifestation of him or herself in an online capacity.

The argument that an opponent of this theory, for example, a student challenging a disciplinary action levied by his school administration, may raise in objection to this, is that a back and forth conversation or interaction of wall/blog posts may create individual catalysts for action, abuse and bullying. Thus, Twitter, AOL instant messaging, GChat, Facebook Chat, and messenger programs may fall more in the “middle” of this analysis and the balancing of interests. In other words, each post, re-post and response may be an action having an ending point in time and space, but this might complicate the analysis. After all, an online conversation, although done through wireless channels, is a dialogue none-the-less. These dialogues can last for days,

1999). Typically learning is described as a stimulus and response relationship, with the classical expression of this theory being B.F. Skinner’s fundamental principle of operant conditioning. *Id.*

¹⁶² *Id.*

¹⁶³ See Bajin, *supra* at note 72 and text accompanying.

months or even years, fostering the environment where some claim to form online “relationships” and even develop online personas.

Isolation in this particular manner, however, does not seem necessarily feasible or realistic when social networking is considered in a realistic context. Friends frequently urge each other to become parts of social network¹⁶⁴ and upon choosing to submit, an individual creates a profile, which they then grow and raise from its online inception or birth. The point of any social medium is to stay connected, update, change, disclose, give TMI,¹⁶⁵ and the like as one’s interests change and tastes evolve. The online “self” is then projected and permitted to connect with others as a means of keeping up to date and networking.¹⁶⁶ It is possible to isolate every small change, but one must question if it makes sense in the context of the whole online identity and the over-arching purpose of social networking on a general level. The purpose of social networking is to have an ongoing, relevant, living representation of oneself “out there” in the cyber sphere that changes as “you” the individual changes. This broadly phrased concept is something that can be understood by nearly all, especially students who reside in the peer pressured, highly image-driven world of secondary education.

The Court should also consider the causal connection between the time and space of the activity and the school district or student regardless of the “physical space” where the bullying occurs. The court might have its analysis informed by a litany of factors, which may have

¹⁶⁴ See ENOUGH IS ENOUGH, FOUNDATION FOR MAKING THE INTERNET SAFER FOR CHILDREN AND FAMILIES, *Cyberbullying Statistics*, <http://www.internetsafety101.org/cyberbullyingstatistics.htm>, (last visited Jan. 7, 2012). The foundation reports that 85% of the parents of youth aged 13-17 report their children have social networking accounts, frequently signing up because their friends joined. *Id.*

¹⁶⁵ “TMI” is a common slang acronym for the words “Too much information.” See generally <http://www.urbandictionary.com/tmi> (online definition incorporates the concept that American youth who use social media are now part of a culture of ‘over-sharers’ who feel the need to necessarily divulge every detail of their personal lives online). Examples of TMI might, on any given occasion include: what someone had for breakfast, their anger at a recent failure of a school exam, a declaration of personal emotions or feelings for a significant other etc.

¹⁶⁶ See generally John Suler, *The Psychology of Cyberspace: The Disinhibition Effect*, (Aug. 2004), <http://users.rider.edu/~suler/psycyber/disinhibit.html#trueself>.

recently occurred, for example: did anything happen between the school and the student such as punishment, or a prior disciplinary event?¹⁶⁷ What were the student's actions the date of the creation? The court should take into account whether or not the speech's purpose was in fact to retaliatory, regardless of whether or not it was against another student, teacher, or the school itself. If the purpose was retaliatory, or can be inferred as retaliatory, this clearly implicates a situation where the school district should be afforded the chance to monitor the student's behavior. By allowing a student to lash out at a peer or the school district through an off-campus Internet forum without the fear of punishment, the school in a sense concedes that it will permit students to potentially disrupt the school environment without the fear of punishment. Before long, the students, who may have been using the Internet forum as a means of expressing a form of 1st Amendment protected "political" speech, will simply be allowed to claim and misapply the shelter of this provision, even when the speech serves no legitimate political function or is merely a piece of vulgar, violent, or threatening speech hidden within the guise of a "political" message.

It is important within this categorical analysis to also consider if there was any change to the online content of the speech over time. If the student changed the online content/post/tweet after the dissemination (such as making it private or limiting the audience¹⁶⁸), the court would need to assess how many students may or may not have already seen the content. For instance, if the student "self-limited" the speech or stopped its spread for fear of punishment, one could argue that this already shows that the environment was affected.¹⁶⁹ Further, an altogether

¹⁶⁷ See *Layshock*, 650 F.3d 205 at 212.

¹⁶⁸ *Id.* at 213.

¹⁶⁹ For instance, it seems to follow that a student's fear of punishment must be grounded in their own firsthand knowledge of the school's disciplinary system; the fear of what could happen if the conduct, in this case the speech, were discovered. Because the student's fear is of this punishment, under a system which he presumably understands in operation, it can be inferred that he must then also know that since he anticipates and fears punishment that he

removal, although not dispositive of the student exhibiting remorse, could potentially have the evidentiary significance that the fear of punishment coupled with the post “getting out of hand” weighs heavily in the favor of the environment being affected by the speech. Finally, it should be considered when (in time), if at all, the school forces the student to take down the Internet speech, as the removal itself might be considered an event. When Justin Layshock was unable to remove the fake profile, he simply left it available to be viewed on MySpace.¹⁷⁰ Justin’s further act, even though beginning as an attempt to correct a wrong, is an act which not only shows a wanton disregard of the commotion he had already caused, but could arguably be seen as an event of “speech” itself. Wanton speech left-posted, adding to a school disruption and done from a computer lab computer,¹⁷¹ should be punishable.

In the final outcome of *Layshock*, the court of appeals decided that schools can punish student speech which rises to the level of cyberbullying and which is outside the schoolhouse gate in a limited context.¹⁷² While the court specifically uses the phrasing, “certain very limited circumstances,”¹⁷³ it offers no further definition. In order for the Court to provide more guidance to the application of this terminology, these “circumstances” must be explored as part of this test and examples should be provided. Guidance for this piece of the test’s inquiry will be supplied by the considering whether or not the lewd or offensive speech was meant to be a “parody,”¹⁷⁴

has, to some extent, disrupted the school’s disciplinary system or materially interfered with the learning environment in a way that precipitates discipline.

¹⁷⁰ *Layshock*, 650 F.3d at 213.

¹⁷¹ *Id.*

¹⁷² *Id.* at 242.

¹⁷³ *Id.* The court explains why it seemingly “punts” in this case as to defining the parameters of when the arm of authority can reach past the school house gates, but seemingly only because the school district did not appeal the lower court’s ruling. *Id.*

¹⁷⁴ *Layshock*, 650 F.3d 205 at 242, n.27 (the court felt the issue turned on whether the school district could punish the student for his expressive conduct outside of school and whether or not it was parody did not matter).

however it should be noted that even a parody,¹⁷⁵ if significantly vulgar or seemingly threatening, may be grounds for justified discipline.¹⁷⁶

Next, another consideration for the “context” of when speech can be punished or not may be able to arise from an examination of the student’s first amendment rights, specifically, the protections contained within rights themselves.¹⁷⁷ One point which needs to be emphasized, is that although this proposed test mandates the balancing of student interests against those of the school district when it comes to online speech, one should remember that the goal of any school district is ultimately to protect its students in such a way that encourages the most positive learning environment. Further, school districts should *also* be viewed as guardians of privacy, in that they have the ability to protect students from bullying and the choices that students may make in response to bullying, especially if the student is a member of what is considered a minority group (legally or within the school district itself). The finder of fact should then, instead, construe the school’s ability and discretion to punish as properly interacting with and ultimately safeguarding student rights, not diminishing them.

For example, in a district court case from Wisconsin, an openly gay student was deemed to have a right (grounded in her First Amendment free speech rights) to wear a pro-LGBT shirt to school without fear of the school district punishing her and thereby informing her parents of her sexual preference.¹⁷⁸ While the court did in fact conduct a type of balancing in the *Nguan*

¹⁷⁵ A generally accepted legal definition for parody is “a reproduction or representation of a literary or dramatic work in structure with changes in the names of characters, also in the situations represented, usually for the sake of comedy.” 18 Am J2d Copyr § 105. Generally, the reproduction contains changes intended to create humor. *BALLENTINE’S LAW DICTIONARY*, 3d Ed. (2010).

¹⁷⁶ See *J.S. ex real v. Bethlehem Area S.D.*, 569 Pa. 638, (Pa. 2002) (violent parody resulting in absence of teacher rose to the level of something that was punishable).

¹⁷⁷ Meaning, what student freedom of speech and expression rights are most consistently recognizes by schools, even outside the context of Internet speech and what affirmative steps do schools take in order to balance the protection of these rights with the school’s legitimate interest in a fundamental learning environment.

¹⁷⁸ *Nguan v. Wolf*, 517 F.Supp.2d 1177 (W.D. Wis. 2007) (the court held that the student had a right of privacy with regard to her parents knowledge of her sexuality, so long as certain factors were met; for example, that she limited public display of affection with her girlfriend).

case,¹⁷⁹ it should be seen as an example of how even though a district might ultimately not have the ability to punish a student, the overall goal is protecting certain vulnerabilities from harm in the most efficient and beneficial way possible.

5. Confronting Problems with Practical Solutions

The proposed solution, while requesting change, should not be construed as if it is urging the Court to overrule *Tinker*. The *Tinker* test, as it exists, is a time-tested means of balancing interests, and serves as the basis for the proposed new formulation. The words and recommendations advocated for herein are simply cautious recommendations and updates and it must be clear that this comment is not advocating for the court to necessarily overrule the test.¹⁸⁰

Recently, two federal courts have held that a school cannot intervene based on every student's right to a free public education (with the thought being that punishment for off-campus speech deprives students of this right), unless the cyberbullying is truly violent or threatening in nature.¹⁸¹ Although in these cases, the court in its reasoning found that a substantial disruption could be found if the cyberbullying speech was part of a larger pattern of behavior overtime,¹⁸² this reasoning and the resultant ruling are insufficient in justifying punishment and insufficient to protect students from the mental and psychological strain cyberbullying causes. If one adheres to the this line of reasoning, essentially the law is saying that the cyberbullying must be violent in nature or reoccurring frequently before the school will step in. Although this predictive

¹⁷⁹ *Id.* at 1180.

¹⁸⁰ It is apparent from the Supreme Court's denial to certify either Layshock's case or Kowalski's, that the Court has yet to deem the time right to analyze or reformulate the *Tinker* analysis. *See Blue Mountain Sch. Dist. v. J.S. ex rel. Snyder*, 11-502, 2012 WL 117558, *1 (U.S. Jan. 17, 2012) (denying also the Layshock's case and Kowalski's 4th Circuit Case). Given certain Court preferences for judicial conservatism and the more fundamentally more cautious, incremental changes in the law that necessarily follow, it is the most prudent course of action that the *Tinker* test not be over-ruled, but simply adjusted, updated, or given a new judicially constructed application to fit the internet era.

¹⁸¹ *See J.C. ex. Rel. R.C. v. Beverly Hills School Dist.*, 711 F.Supp. 2d 1094 (C.D. Cali. 2010); *Wisniewski v. Bd. of Educ. of Weedsport Central Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007).

¹⁸² *Wisniewski*, 494 F.3d at 40.

construction of the law—as the speech first breaching a threshold of violence before deemed punishable—is a more extreme result, it should not be overlooked as a potential outcome. Given the widespread use of internet media as a means of student communication and cyberbullying—it is no longer feasible to adopt a policy of “wait and see,” when “wait and see” has too often turned into “too little too late.” It is too late for Jamey, Phoebe, Ryan, and Alexis, but their fate need not befall the countless other would-be victims: sitting behind computer screens and contemplating ending their lives because of cyber-torment which school districts are not willing or able to end.

The Court will undoubtedly weigh the speech in favor of a substantial disruption if the speech has the ability to pull a school administrator away from his or her normal duties to address the speech.¹⁸³ Due to the growing reports of students affected and harmed by cyberbullying, the stakes are heightened and a school should not have to wait until the online speech crosses the aforementioned threshold.¹⁸⁴ For example, speech has also been found to be a substantial disruption if it causes the absences of a targeted teacher.¹⁸⁵ Although it would be difficult to determine if the speech causes the absence of a student, as an overarching consideration, any speech that is threatening or violent should be considered a substantial disruption, as it has the power to disturb not only the target student, but those around him once the bully’s cyber-speech inflicts the student past a certain extreme. Too many students and their respective educations have been negatively impacted, learning environments destroyed, and young lives lost to wait until the speech crosses the threshold into the realm of “punishable.”

IV. IN THE ALTERNATIVE: SOLUTIONS RELYING IN INTERNAL POLICY AND LEGISLATION

¹⁸³ See *Mordis v. Hannibal*, 684 F.Supp.2d 1114 (E.D. Mo. 2010).

¹⁸⁴ A certain level of the disruption’s severity need not be attained if the speech proves to be potentially harmful at the outset.

¹⁸⁵ See *J.S. ex real v. Bethlehem Area S.D.*, 569 Pa. 638, (Pa. 2002).

A. *Educate, Train, Repeat*

While an update to the *Tinker* speech test is needed, a potential alternative course of action is to train and educate students on the many facets of bullying, with a special focus on cyberbullying. Instead of merely setting up a regulatory scheme of punishment that can be meted out at the school district's discretion, education may instead take the form of policies in a student handbook, a factor that also might be considered in balancing the interests. The school however, will still need guidance as to the substance of handbook policy language and whether ultimately policies should regulate only on-campus speech. Adding this element would establish a clearly defined "when" and "where." Applied pre-emptively, this could stop many of the common type occurrences of cyberbullying.

By giving specific examples after articulating a comprehensive normative standard (so as not to be facially unconstitutional for vagueness)¹⁸⁶ a school district has the ability to take a preventative standpoint rather than one that is purely reactionary to student behavior. By being reactionary instead of preventative, the school district is arguably allocating more power to the student unnecessarily, and allowing *them* to have a say as to what controls behavior instead of the school administrators.

The school district must also consider the method(s) of implication of a preventative policy. Some school officials feel that a school district should begin indoctrinating its students about the issues of anti-cyberbullying at the youngest age possible.¹⁸⁷ Individual instructor and administrator trainings should first focus on aiding the faculty in identifying both cyberbullying and student-best-practices, with a district wide implementation program closely following. In

¹⁸⁶ See *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, (3rd Cir. 2011). In formulating its answer, even though the court fails to adopt an updated test, it provides guidance on how to structure school policies so they are not overly broad or void for vagueness. *Id.*

such a district-wide program, students collaboratively (on a small scale in their classrooms) and collectively (through school-wide programs and assemblies) learn what constitutes the school's adopted anti-bullying policies, which are then widely disseminated amongst a school population and easily understood.¹⁸⁸ Educators and parents alike fear, however, that U.S. schools are already past the point of no return. A pre-emptive strike against a cyberbullying problem that has already reached monumental destructive capacity may be too little too late.¹⁸⁹ While it is not foolish to hope that policies adopted for a new generation of students will have the desired impact of reducing cyberbullying, another way to cope with the growing confusion on the laws application is for lawmakers to specifically issue mandates as to the scope of the school district's discretion in punishing the behavior at issue.

B. Leave it to the Lawmakers

A more viable solution would be the adoption of specific legislation, whether state or federal, to address the growing concerns surrounding cyberbullying and detail the discretionary powers of discipline school districts can have. This grant of authority would then define the limits of what can be punished and would need to surmount generalities and get to the core of the problem as well: can student speech be punished when it is done off campus, and in what circumstances can it be punished? One problem with this solution is that even if laws are adopted similar to those that have been seen in other states, this does not necessarily conclude the issue surrounding the jurisprudence. The court's standard defining what speech can be punished has the potential to remain vague, as students may attempt to still bring claims that the school district, while conducting itself within the bounds of the new law, did not accord with the principles set forth in the case law regarding student First Amendment rights.

¹⁸⁸ *Id.*

¹⁸⁹ *See infra* Part III.A.5.

C. *Best Practices*

Out of all the solutions proposed above, the seemingly most plausible explanation is the solution that addresses the problem in the best way is a combination of a new court decision to be put on the books and in the meantime, state and local laws be promulgated that aid school officials in implementing anti-cyberbullying programs. While of course it is always interesting to note the opposing views that have already been proposed, one must distinguish this solution from some which promote ideas that are essentially disturbing and antiquated.

Several existing scholarly works or supposed research studies seem to suggest that student internet speech could actually be a self-regulating mechanism¹⁹⁰ and that it is natural for students to want to “vent” at each other, with the internet and social networking providing the perfect forum to do so.¹⁹¹ Perhaps the notion behind this disastrous suggestion is correct—and society wants to believe that the younger generations will learn from their mistakes and be able to evolve into mature members of their respective communities. But the reality is that secondary students’ involvement with the cyberbullying, which is consistently in the public eye, has reached proportions of severity (if not in numbers) that no longer can go unchecked or self-checked. The over-optimistic outlook that kids will simply vent and have the awareness of when speech crosses into dangerous territory is outmoded by the maliciousness, undergirding the reality of many student online interactions.

V. PRACTICALITY AND PREDICTIONS

A. *Problem and Answer: The Usefulness of the Reformulated Test to Practitioners*

It is, of course, necessary to address any questions that the proposed solution of an update to the *Tinker* test might leave. One of the most foreseeable questions that will be raised by such

¹⁹⁰ Student Comment/Anonymous, FACEBOOK AND OTHER STUDENT TECHNOLOGY MISUSES, 16 WIDENER L. REV. 89, 90 (2010)

¹⁹¹ *Id.* at 98.

a proposed update to the *Tinker* test is the notion of constant technological advances and changes--consumers often joke about how one cannot even remove certain technology products from the retail shelf without the immediate threat of being obsolete. However, this matter is of course far more serious and drafters must consider the solidification and implementation of a policy that is applicable to such rapidly changing technology. Any new judicial test, law, or school district policy must be able to compete with the growth of social media. The classic example to this is the constant “updates” and changes to Facebook¹⁹²: those evaluating and making such policies must be willing to re-evaluate frequently and students must be willing to adapt.

While Facebook users might half-heartedly complain about the change in how status updates are projected or the consistent changes to their privacy settings, other conniving students might see this as a loophole to evade a school policy that may be based on a proposed test. A clever manipulation of how the actual cyberbullying is accomplished may be just the way (or perhaps a quick way) to get around a carefully crafted test—bringing society right back to where it began.

The counter to this, however, is that once the broad new re-envisioning of the *Tinker* test is put in place (in the form of a law or perhaps judicial test), it will allow school administrations much more discretion (within reason) as to how they will administer the law in their own districts. This does not mean giving carte blanche to punish, but this allows the school board or central office the capacity to create any provisions within their own cyberbullying policies that will allow for the facilitation of the national or state law. It should also be noted that this would perhaps be the best way and the best circumstances to administer “student pre-emptive/teaching” of the policies—as school districts comply and make updates or changes to their existing

¹⁹² *Supra* note 128 and text accompanying.

policies, keep students and parents informed by having mandatory sessions where students must learn and become familiar with the updated policies and sign a code of conduct or letter of understanding that the policies were introduced and explicated for them.¹⁹³

Another potential outcome/threat to this structure may be the nagging insistence of certain critics that parents have the duty, means, and ultimately right, as conferred by the Fourteenth Amendment, to raise their children¹⁹⁴ and reasonably included in the concept of child rearing is the monitoring of student online activity. This argument however overlooks the fact that while parents may be in the best position to individually monitor their child's respective activity; the school district is ultimately in a better position to monitor and control inter-student online behaviors.

If this issue does in fact get granted certification in the context of another case, it will be helpful to predict how the justices of the Robert's Supreme Court may rule on the issue, based on past rulings and political inclinations and leanings. Specifically, it will be interesting to note a possible prediction based on Justice Samuel Alito's concurrence in *Morse* in which he opined, "that this is the far reaches of what student speech permits."¹⁹⁵ Some theorists and scholars have said that this quote proves that Alito favors more protectionist measures for student speech and he would most likely favor a provision which restricts the discretion of school districts in punishing speech, leaning more toward support of the students.¹⁹⁶

Lastly, there are a few other pieces of the puzzle that may be interesting to consider in an attempt to formulate the most cohesive solution possible. There is also the continuing notion that

¹⁹³ Another interesting solution in general is perhaps having students serve on advisory boards/work with the administration to develop policies that are most applicable to students and put into terminology that student's can best comprehend. By drawing student "leaders" from a variety of backgrounds the district can make sure that the input is balanced to a degree and more likely to be accepted and adhered to by a broader range of students.

¹⁹⁴ U.S. CONT. amend. XIV, § 3.

¹⁹⁵ *Morse v. Frederick*, 551 U.S. 393 (2007). Alito's concurrence was joined by Kennedy and may perhaps be indicative of his view as well.

¹⁹⁶ See Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1052 (2008).

some scholars note that the cases most frequently cited deal with student on adult violence and not student on student, which was the case in both *Layshock* and *J.S.*¹⁹⁷ Finally, there is the possibility in some cases that criminal punishment can be meted out in response to cyberbullying, however this is rare and normally the bullying must rise to the level of harassment.

VI. CONCLUSION: MODEL BEHAVIOR, CELEBRITY STATUS, AND THE TENTATIVE NEW HOPE

The *Tinker* test, while still functional in some contexts, is in desperate need of a renovation. One need only look to the number of students who still affirm they feel bullied online by others in their school community to recognize that *Tinker* is no longer workable.¹⁹⁸ The exigency of the situation is thus determinative upon the fact that cyberbullying is not going away, its not being quelled, and if continued to be left unchecked, the horrifying results that happened to Ryan Halligan, Phoebe Prince, Alexis Pilkington, and Jamey Rodeymeyer will become even more prolific.

While this comment ultimately argues for school districts to have the ability to punish off-campus cyberbullying speech, it is not an avocation for the intrusion upon all student-speech. Students must be allowed to express themselves in a healthy way, even if it is the controversial proclamation of a sexual preference, idea, or belief. It is the peer reaction of death threats, wishes, and violence, which must be ended. It is imperative that if American parents, students, administrators, and every citizen alike do not want to live in a society that construes loss of a young life through internet-induced peer cruelty, the law, in some capacity must step-up and lay

¹⁹⁷ *Layshock v. Hermitage Sch. Dist.*, 593 F.3d 249, (3d Cir. 2010), vacated, rehearing en banc, 650 F.3d 205 (3d Cir. 2011) (Jordan, K., concurring), aff'g 496 F.Supp. 2d 587 (W.D. Pa. 2007); *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, (3d Cir. 2011).

¹⁹⁸ See *That Facebook Friend Might be 10 Years old, and Other Troubling News*, CONSUMER REPORTS MAGAZINE, June 2011, available at <http://www.consumerreports.org/cro/magazine-archive/2011/june/electronics-computers/state-of-the-net/facebook-concerns/index.htm>. The survey reports that “one million children were harassed, threatened, or subject to other forms of cyberbullying” on Facebook over the past year. *Id.*

down a concrete law or test, or, perhaps more efficiently, redefines the loose terms of the existing test once and for all.¹⁹⁹ It was too late for Ryan, Phoebe, Alexis and Jamey. But its not too late other would-be victims of cyberbullying, who, though cowering behind their computer screens, still might be persuaded to step back from the ledge.

¹⁹⁹ See Daniel, *supra* note 89. It is also of note that many articles have, as early as 2009, claimed that the Supreme Court will soon make a final judgment in this area. See REVIEW OF CASES AND CONTROVERSY, 8 UNC FIRST AMEND. L. REV. 86, 90 (2009). Hopefully, no one was holding his or her breath on this one, as a decision has yet to even have been certified to be decided by the land's highest court, with this last refusal in January being the most recent court denial.